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NAGENDRAN AMARETHELIMGAM v. PP

COURT OF APPEAL, PUTRAJAYA
AZIAH ALI JCA
ABDUL AZIZ ABDUL RAHIM JCA
VERNON ONG LAM KIAT JCA
B [CRIMINAL APPEAL NO: K-05-223-08-2014]
22 OCTOBER 2015

CRIMINAL LAW: *Dangerous Drugs Act 1952 – Section 39B(1)(a) – Trafficking in dangerous drugs – Appeal against conviction and sentence – Drugs found inside bag – Whether appellant's identification card ('IC') recovered from bag – Whether discrepancies existed between raiding officer's oral evidence and police report – Whether materially inconsistent with prosecution's case – Whether appellant had knowledge of drugs inside bag – Whether contemporaneous documents indicated that IC recovered from bag – Whether trial judge's findings supported by evidence – Whether decision of trial court set aside*

The appellant was charged under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') for trafficking in dangerous drugs. A police raiding team, led by SP2, raided a house where the appellant, together with three other people were seen in the living room of the said house. SP2 requested for their identification cards ('IC') and the three people, except for the appellant, handed over their respective IC's to SP2. According to the appellant, his IC was upstairs. There were two rooms upstairs and in one of the rooms, SP2 saw a black bag. In response to SP2's question, the appellant indicated that his IC was in that room and SP2, together with Sergeant Kamarudin ('SP3') entered the said room. Upon examination, the appellant's IC, a blue plastic bag which contained 69 transparent plastic packets filled with powder and lumps and a black plastic bag, were found inside the bag. The substances were confirmed to be dangerous drugs which consisted of 21.4g heroin and 6.1g monoacetylmorphines. *Vide* his defence, the appellant argued that his IC was not found in the bag and the other three occupants, together with the appellant, did not have knowledge as to who owned the bag. The High Court Judge, however, found the appellant guilty and sentenced him to death. It was found that the appellant had possession and control of the bag and the dangerous drugs since his IC was inside the bag and he had failed to rebut the presumption of trafficking under s. 37(da)(iiia) of the DDA. Aggrieved, the appellant appealed to this court and argued, *inter alia*, that (i) there were contradictions between SP2's oral evidence and his police report; (ii) he did not have knowledge about the drugs in the bag; (iii) it was highly improbable for the appellant to have placed his IC in the bag containing the dangerous drugs; (iv) there was no evidence to support the prosecution's case that the appellant's IC was recovered from the bag; and (v) the trial judge ignored the contemporaneous evidence where the photographs did not show the appellant's IC and the search list showed that

all the individuals were present at the time of the raid as opposed to SP2's evidence that only the appellant was in the room where the bag was recovered. Among the issues which arose for consideration were (a) whether a *prima facie* case had been made out; (b) whether the trial judge's findings were supported by evidence; (c) whether the trial judge failed to draw an inference in favour of the appellant; and (d) whether the trial judge misdirected himself on the burden of proof.

Held (dismissing appeal)
Per Vernon Ong Lam Kiat JCA delivering the judgment of the court:

(1) A *prima facie* case had been made out against the appellant. SP2's evidence which was corroborated by SP3 showed that the appellant's IC was recovered from the bag in the appellant's presence. Inside the bag, there was a blue plastic bag and a black plastic bag. This fact was corroborated by the photographs, search list and the handover list. The contents of the substances found in these plastic bags had been analysed as heroin and monoacetylmorphines as per the charge. In the circumstances, there was no merit in the appellant's argument that the trial judge's findings were not supported by evidence. (para 21)

(2) The discrepancies between SP2's oral evidence and his police report related to certain omissions which were not materially inconsistent with the prosecution's narration of the facts during trial. The omissions did not diminish the weight of SP2's evidence or his credibility. Accordingly, the argument that the trial judge misdirected himself on the burden of proof was without merit (*Timhar Jimdani Ong & Anor v. PP*; refd). (paras 22 & 23)

(3) The absence of the appellant's IC in the photographs and the lack of explanation as to what happened to the IC after the appellant's arrest did not materially affect the credibility of SP2 and SP3. There was ample evidence in the form of the contemporaneous documents such as the search list, handover list and the police report which showed conclusively that the appellant's IC was recovered at the place of the incident and specifically in the bag. The appellant's IC was found in the bag with the dangerous drugs. It was reasonable to infer that the person who placed the drugs inside the bag was the appellant and there was direct evidence of *mens rea* possession. (para 24)

Case(s) referred to:
Gooi Loo Seng v. PP [1993] 3 CLJ 1 SC ***(refd)***
PP v. Lee Eng Kooi [1993] 2 CLJ 534 HC ***(refd)***
PP v. Norhazwan Abd Wahab [2014] 1 LNS 275 CA ***(refd)***
Timhar Jimdani Ong & Anor v. PP [2010] 3 CLJ 938 CA ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 37(da)(iiia), 39B(1)(a)

A *For the appellant - RSN Rayer; M/s R Nethaji Rayer & Co*
For the respondent - Hamdan Hamzah & Jean Sharmila Jesudason; DPP

[Editor's note: Appeal from High Court, Alor Setar; Criminal Trial No: 45A-18-5-2013 (affirmed).]

B *Reported by Kumitha Abd Majid*

JUDGMENT

Vernon Ong Lam Kiat JCA:

Introduction

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[1] The appellant was charged for trafficking in dangerous drugs under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (DDA 1952). The charge against the appellant reads as follows:

> Bahawa kamu pada 05hb Januari 2013 jam lebih kurang 12:10 tengah hari, di rumah beralamat 58, Jalan Belakang Hospital Sungai Petani, di dalam daerah Kuala Muda, di dalam Negeri Kedah Darul Aman telah didapati mengedar dadah berbahaya seberat 27.5 gram (Heroin seberat 21.4 gram dan Monoacetylmorphines seberat 6.1 gram). Oleh yang demikian kamu telah melakukan satu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

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The Prosecution Case

[2] On 5 January 2013, acting on information received of drug trafficking activities, a police raiding party led by Insp Nazro Hussam bin Abdullah (SP2) went to a house bearing address No. 58, Jalan Belakang Hospital Sungai Petani. Upon entering into the house SP2 found four persons including the appellant in the living room. After identifying himself, SP2 and his team searched the living room but did not find anything illegal. SP2 then asked the four persons for their ICs. Three of the persons handed over their ICs whilst the appellant said that his IC was upstairs. SP2 and his team brought the four persons to the first floor of the house where there were two rooms. SP2 saw that there was a black Polo bag (P10) inside the first room. In response to SP2's question, the appellant indicated that his IC was in that room. SP2 and Sarjan Kamarudin bin Awang (SP3) entered the room. SP2 examined the bag P10 and found the appellant's identity card (IC) and a blue plastic bag (exh. P12) containing 69 transparent plastic packets filled with powder and lumps (exhs. P12(1)-(69)). A black plastic bag (exh. P13) was also found inside bag P10.

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[3] Suspecting the substances to be dangerous drugs, SP2 arrested the appellant and seized the items. The appellant and the items were taken to the Kuala Muda police station and handed over to the investigation officer, Insp Zulhafiz bin Zainudin (SP4). SP4 sent the items to the chemist Puan

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Marhayani binti Mad Saad (SP1) for analysis. SP1 confirmed the substances contained the dangerous drugs heroin weighing 21.4g and monoacetylmorphines weighing 6.1g as per the charge.

Findings Of The Trial Judge

[4] At the end of the prosecution case, the learned judge found the appellant had physical possession and control of the dangerous drugs in the bag P10. The learned judge accepted the prosecution's evidence that the appellant's IC was found in bag P10. The learned judge also drew an inference that the appellant had *mens rea* possession of the drugs because the appellant wanted to prevent the police party from finding the dangerous drugs when he asked for the bag P10 to be given to him on the pretext that he would take out his IC.

[5] Applying s. 37(da)(iiia) of the DDA 1952, the learned judge invoked the presumption that the appellant was trafficking in the dangerous drugs. Accordingly, the learned judged ruled that the prosecution had made out a *prima facie* case against appellant and called upon the appellant to enter in his defence.

The Defence Case

[6] In essence, the defence of the appellant is that his IC was not found in bag P10. According to the appellant, he had produced his IC from his trouser pocket and given it to SP2 at the ground floor. After the bag P10 was brought down by the police officers from the first floor, the appellant and the other three persons were asked about the bag's owner to which they all answered in the negative. The appellant's evidence was supported by the evidence of three witnesses for the defence: the appellant's brother Velan a/l Amarethelingam (SD2), the appellant's mother Mageswari a/p Heng Chun Seng (SD3) and the appellant's friend Sathiskumar a/l Segoran (SD4).

Findings Of The Trial Judge At Close Of Defence Case

[7] The learned judge evaluated the totality of the evidence on the question of: (i) whether the appellant's IC was not found in bag P10; and (ii) whether bag P10 was found by the police officer without the presence of the appellant.

[8] The learned judge considered the appellant's evidence which suggest that bag P10 did not belong to him and is was possible that it belonged to the appellant's friends who came to the house for music sessions. The learned judge found it was unlikely that the appellant's friends would have left the bag containing the valuable dangerous drugs in the house. The learned judge preferred the evidence of SP2 and SP3 as their evidence was not contradicted by other evidence or shaken by cross-examination.

[9] The learned judge also found the evidence of the appellant did not raise any reasonable doubt on the prosecution case that the appellant's IC was in bag P10 containing the dangerous drugs. The fact of the appellant's IC in bag P10 pointed to the appellant having possession and control of the bag and the dangerous drugs therein. The learned judge also found the appellant had failed to rebut the presumption of trafficking under s. 37(da)(iiia) of the DDA 1952. On the totality of the evidence, the learned judge found the prosecution had proven the case against the appellant beyond a reasonable doubt. The appellant was convicted and sentenced to death.

The Appeal

[10] Although the petition of appeal contains 14 grounds of appeal, before us, learned counsel for the appellant canvassed only the following grounds:

(i) that the prosecution has failed to make out a *prima facie* case;

(ii) that the learned judge's findings are not supported by the evidence;

(iii) that the learned judge failed to draw inferences in favour of the appellant;

(iv) that the learned judge misdirected himself on the burden of proof; and

(v) that the learned judge did not direct his mind to the issue of the disappearance of the IC.

First Issue: Whether Prima Facie Case Made Out?

[11] The main attack relates to the appellant's IC which does not appear in the photographs of the bag P10 and exhs. P12 and 13. Learned counsel argued that if the IC had been found in bag P10, it should have been in the photographs. In fact, SP2 was not telling the truth; the IC was never recovered from bag P10. Further, the photographer was not called to explain. The search list also refers to the appellant's IC. As such, it should be inferred that the IC was not found in bag P10.

[12] Learned counsel also argued that the fact that the search list also listed the names of four other persons in the house corroborates the appellant's version that they were all on the ground floor when SP2 and his police party went upstairs and recovered bag P10. The appellant and the other four persons had all denied ownership of bag P10. If the appellant's IC was in bag P10, why were the other persons not asked to sign and acknowledge that fact in the search list. Further, SP4 the investigation officer had in his evidence in chief identified all the exhibits except for the appellant's IC.

[13] It was also argued that the learned judge ignored the contemporaneous evidence - (i) the photographs, which does not show the appellant's IC; and (ii) the search list which shows that all the individuals were present at the time of the raid as opposed to SP2's evidence that only the appellant was in the upstairs room where bag P10 was recovered. Learned counsel also argued

that the main reason the learned judge disbelieved the appellant was because the learned accepted SP2's evidence that the appellant wanted to prevent SP2 from opening bag P10 even though that fact was not mentioned in the search list (*Gooi Loo Seng v. PP* [1993] 3 CLJ 1; [1993] 2 MLJ 137 (SC)).

Second Issue: Whether The Learned Judge's Findings Are Supported By The Evidence?

[14] Firstly, learned counsel argued that there are contradictions between SP2's oral evidence and his police report. SP2's oral evidence is that:

(a) there were five persons of Indian origin, four male and one female, inside the living room;

(b) nothing illegal was found on their persons;

(c) when SP2 asked them for their ICs, all of them produced their ICs except for the appellant;

(d) the appellant told SP2 that his IC was upstairs;

(e) SP2 and his police party then brought all the five individuals upstairs; (vi) the appellant indicated to SP2 the room in which his IC was kept;

(f) SP2, SP3 and the appellant entered the room;

(g) SP2 saw bag P10 in the room and took it;

(h) the appellant asked SP2 to hand over bag P10 to him so that he could take out his IC;

(i) SP2 did not accede to the appellant's request and SP2 opened bag P10 himself; and

(j) inside bag P10, SP2 found the appellant's IC and exhs. P12 and P13.

[15] According to SP2's police report (exh. D1), all of the five individuals led SP2 to the discovery of bag P10 in the room upstairs. SP2 opened bag P10 in front of the five individuals. SP2 found the appellant's IC and exhibits P12 and P13 in bag P10. Therefore, learned counsel argued that there are significant contradictions between oral evidence, SP2's police report, the search list and the photographs (*PP v. Lee Eng Kooi* [1993] 2 CLJ 534; [1993] 2 MLJ 322).

[16] Secondly, learned counsel argued that the learned judge failed to give proper weight to the evidence of the appellant and the other defence witnesses that bag P10 did not belong to the appellant and that they have never seen the appellant using bag P10. Their evidence was not rebutted as the prosecution did not call rebuttal witnesses (*PP v. Norhazwan Abd Wahab* [2013] 3 CLJ 1221 (HC)).

[17] Thirdly, learned counsel argued that it is highly improbable for the appellant to place his IC in bag P10 containing the dangerous drugs unless he was unaware that bag P10 did in fact contain the dangerous drugs, in which case it cannot be said that the appellant had knowledge of the drugs being in bag P10 (*PP v. Norhazwan Abd Wahab* [2014] 1 LNS 275 Court of Appeal's decision dated 2 December 2013 affirming High Court's decision).

[18] Lastly, learned counsel argued that SP2's evidence that the appellant tried to prevent him from taking the appellant's IC from bag P10 is not probable because that crucial fact is not mentioned in SP2's police report D2.

Third And Fourth Issue: Whether The Learned Judge Failed To Draw Inferences In Favour Of The Appellant And To Consider The Credibility Of SP2 And SP4? Whether The Learned Judge Misdirected Himself On The Burden Of Proof

[19] Learned counsel argued that there are material contradictions between the oral evidence of SP2 and his police report (see paras. 13 and 14 above). It was argued that on the totality of the evidence and in particular to the credibility of SP2 and SP3, a number of different inferences could be made. The learned judge ought to have drawn the one most favourable to the appellant (*Lee Eng Koi* (*supra*)).

Fifth Issue: Whether The Learned Judge Failed To Direct His Mind To The Issue Of The Disappearance Of The IC?

[20] Learned counsel argued that the learned judge failed to direct his mind to the issue of the disappearance of the appellant's IC. The appellant's IC is a material evidence as it is the link which connects the appellant to bag P10 and to the dangerous drugs. It is highly improbable for the appellant to have placed his IC in bag P10 which contains dangerous drugs. The prosecution failed to prove that they recovered the appellant's IC from bag P10. There is no evidence to support the prosecution case that the appellant's IC was recovered from bag P10. The prosecution have also conceded that there is no explanation as to why the appellant's IC has disappeared. The documentary evidence do not show what happened to the appellant's IC after it was recovered. The appellant's IC must have been kept for the purposes of the trial. As the appellant's IC is missing, the chain of evidence is broken. If the court disbelieves the evidence on the appellant's IC, then the evidence of SP2 regarding the appellant's conduct should also be disbelieved.

Decision

[21] On the first and second issues, we are satisfied that on the prosecution's evidence, the learned judge was correct in finding that a *prima facie* case has been made out against the appellant. The evidence of SP2 which is corroborated by SP3 shows that the appellant's IC was recovered from bag P10 in the appellant's presence. It is also in the evidence that inside bag P10 was a blue plastic bag P12 and a black plastic bag P13. This fact is corroborated by the photographs, the search list and the handover list. The

contents of the substances found in P12 and P13 have been analysed by SP1 to be heroin and monoacetylmorphines as per the charge. As such, there is no merit in the appellant's argument that the learned judge's findings are not supported by the evidence.

[22] The third and fourth issues related to the complaint that the learned judge ought to have drawn an inference favourable to the appellant. This argument is predicated on the discrepancy between the oral evidence and police report of SP2. In his judgment, the learned judge found that there were some discrepancies between SP2's oral evidence and his police report. However, the learned judge found that the discrepancies were only minor and did not result in SP2's evidence being rejected. SP2 and SP4 were not cross-examined on the discrepancies. At p. 8 of his judgment, the learned judge said:

> [13] Saya dapati terdapat sedikit percanggahan di antara keterangan SP2 dan laporan polis yang beliau buat (D1). Bagaimanapun percanggahan ini bukanlah percanggahan yang material. Percanggahan tersebut adalah percanggahan yang kecil dan ini tidak menjadikan keterangan SP1 (*sic*) tidak boleh diterima. Di dalam kes ini tidak ada pemeriksaan balas telah dilakukan oleh peguam bela ke atas SP2 atau SP4 mengenai percanggahan di antara kandungan D1 dan keterangan lisan SP2. SP2 sepatutnya di periksa balas untuk membolehkan Mahkamah melihat sejauh mana percanggahan tersebut kerana jawapan kepada soalan yang ditanyakan boleh menentukan sejauh mana materialnya percanggahan yang berlaku. Walaupun D1 telah dikemukakan melalui SP4, namun tidak ada apa-apa soalan ditanya kepad SP4 tentang kandungan D1. Adalah menjadi prinsip undang-undang bahawa apa yang terdapat di dalam laporan polis bukanlah satu keterangan utama (*Herchun Singh & Ors v. PP* [1969] 2 MLJ 209) kerana laporan polis dibuat dengan tujuan membuktikan dadah berbahaya dijumpai dan orang yang disyaki melakukan kesalahan (*sic*) berkaitan dadah berbahaya tersebut ditangkap. Keterangan yang lengkap akan diberikan secara lisan di dalam mahkamah dan dalam keadaan tersebut percanggahan yang sedikit memang boleh dijangka akan berlaku.

[23] We have examined the appeal record and are satisfied that the discrepancies relate to certain omissions which are not materially inconsistent with the prosecution's narration of the facts during the trial. Accordingly, we are satisfied that the omissions did not diminish the weight of SP2's evidence or his credibility (*Timhar Jimdani Ong & Anor v. PP* [2010] 3 CLJ 938 (CA)). Accordingly, the argument that the learned judge misdirected himself on the burden of proof is without merit.

[24] The fifth issue is the main plank of the appellant's appeal. On the totality of the evidence, we take the view that the absence of the appellant's IC in the photographs and the lack of explanation as to what happened to the IC after the appellant's arrest does not materially affect the credibility of SP2 and SP3. We find that there is ample evidence in the form of the contemporaneous documents such as the search list, handover list and the

police report which shows conclusively that the appellant's IC was recovered at the place of the incident, and specifically in bag P10. We accept the evidence of SP2 and SP3 that the appellant's IC was found in bag P10 with the dangerous drugs. Based on this evidence, it is reasonable to infer that the person who placed the drugs inside bag P10 was the appellant and that there is direct evidence of *means rea* possession.

[25] For the foregoing reasons, we find no merit in this appeal. Accordingly, the appeal is dismissed. The conviction and sentence are affirmed.